(2)

SUPREME COURT, U.S.
FILED
NOV 12 2003
OFFICE OF THE CLERK

No. 03-548

IN THE

Supreme Court of the United States

RUETH DEVELOPMENT COMPANY and
HAROLD G. RUETH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

STEPHEN A. STUDER
PLEWS SHADLEY RACHER & BRAUN
53732 Generations Drive
South Bend, IN 46635-1539
(574) 273-1010

LAURENCE A. MCHUGH*
BRIAN E. CASEY
BARNES & THORNBURG
100 North Michigan Street
Suite 600
South Bend, IN 46601
(574) 233-1171

* *Counsel of Record*

Attorneys for Petitioners

184151

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

4 pp

PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners respectfully submit this Supplemental Brief pursuant to Supreme Court Rule 15.8 to call attention to two additional petitions for writs of certiorari which were filed after Petitioners filed their petition which present essentially the same substantive question.

On October 28, 2003, Newdunn Associates, LLP, et al. filed their petition for a writ of certiorari seeking review of the Fourth Circuit's decision in *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003). *See Newdunn Associates, LLP v. United States*, No. 03-637. On November 10, 2003, James and Rebecca Deaton filed their petition for a writ of certiorari seeking review of the Fourth Circuit's decision in *United States v. Deaton*, 323 F.3d 698 (4th Cir. 2003). *See Deaton v. United States*, No. 03-____.[1]

Petitioners here have asked

> [w]hether the Seventh Circuit erred in concluding that Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), permits the government to regulate wetlands that 'are *not* adjacent to open water' in contravention of this Court's decision in *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 168 (2001) [*SWANCC*].

---

1. It is also counsel's understanding that a petition for a writ of certiorari is forthcoming on behalf of John A. Rapanos appealing the Sixth Circuit's decision in *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003). That case, as discussed in Petitioners' petition, addresses the same issues presented by Petitioners and the *Deaton* and *Newdunn Associates* petitions.

Petitioners in *NewDunn Associates* and *Deaton* present substantively identical questions in their petitions. In *NewDunn Associates*, Petitioners ask "[w]hether federal Clean Water Act jurisdiction over 'navigable waters' extends to wetlands that are not adjacent or contiguous to open waters but from which rainwater runoff may occasionally reach navigable waters located miles away through a series of manmade, indirect, ephemeral, and intermittent surface water connections."

Similarly, in *Deaton*, Petitioners ask whether a "roadside ditch and the wetland next to it [are] 'navigable waters' under the Clean Water Act?"

Notwithstanding the Government's waiver of an opposition, these recently-filed petitions highlight the continuing confusion in the appellate courts over the Government's authority pursuant to 33 U.S.C. § 1344(a) to regulate wetlands not adjacent to open water consistent with *SWANCC*. Petitions from two (soon to be three) circuits now raise this same fundamental question about whether such authority exists. Contrary to the conclusions reached by the circuits giving rise to these petitions, the Fifth Circuit has already concluded that it does not. *See Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001). Courts, regulatory agencies, and the public have disagreed over how to define the limits of the Government's jurisdiction ever since *SWANCC*. They will continue to do so until this Court provides additional guidance in this area. These additional petitions underscore the need for plenary review of the action below. Petitioners' petition for a writ of certiorari should therefore be granted.

CONCLUSION

For all of the foregoing reasons, the petition should be granted.

Respectfully submitted,

STEPHEN A. STUDER
PLEWS SHADLEY RACHER
& BRAUN
53732 Generations Drive
South Bend, IN 46635-1539
(574) 273-1010

LAURENCE A. MCHUGH*
BRIAN E. CASEY
BARNES & THORNBURG
100 North Michigan Street
Suite 600
South Bend, IN 46601
(574) 233-1171

* *Counsel of Record*

Attorneys for Petitioners